



**Office of the Attorney General
State of Texas**

DAN MORALES
ATTORNEY GENERAL

March 31, 1995

Ms. Lois Villaseñor
Interim Director
Texas Funeral Service Commission
8100 Cameron Road, Suite 550
Austin, Texas 78954-3896

Letter Opinion No. LO95-025

Re: Whether the release of subpoenaed information to the Hidalgo County, Texas, Grand Jury implicates section 552.352 of the Government Code, a provision in the Open Records Act providing criminal penalties for the release of confidential information (RQ-774)

Dear Ms. Villaseñor:

The Texas Funeral Service Commission (the "commission") received a subpoena duces tecum from the Hidalgo County, Texas, Grand Jury directing the commission's custodian of records to produce certain investigative reports. Section 6D(d) of V.T.C.S. article 4582b deems these reports to be "not public information." Therefore, in the context of a request for these records under the Open Records Act, chapter 552 of the Government Code, the reports are excepted from required public disclosure under section 552.101 of the Government Code.¹ See Letter Opinion No. 94-24 (1994). Your predecessor asked whether the release of the subpoenaed information to the Hidalgo County, Texas, Grand Jury implicates section 552.352 of the Government Code, a provision in the Open Records Act providing criminal penalties for the release of confidential information.

This request for information was not made under the Open Records Act. Rather, the grand jury issued a subpoena duces tecum pursuant to articles 24.01(a)(2)(C) and 24.02 of the Code of Criminal Procedure. Article 24.09 of the Code of Criminal Procedure authorizes the district court to determine whether a witness is justified in not producing subpoenaed information. See also Code Crim. Proc. arts. 24.06 (defining disobedience of subpoena as refusal without legal cause to produce evidence.), .08 (providing witness opportunity to show good cause why evidence was not produced). Consequently, since the grand jury seeks information under chapter 24 of the Code of Criminal Procedure, that chapter provides the commission the appropriate method to

¹Section 552.101 of the Government Code provides that information is excepted from required public disclosure if it is "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

determine whether the subpoena can reach information that is declared to be "not public information" under V.T.C.S. article 4582b, section 6D(d). *See* Attorney General Opinion H-231 (1974); *cf.* Attorney General Opinion JM-1048 (1989) (Open Records Act does not govern availability of information sought through discovery in proceeding conducted under former Administrative Procedure and Texas Register Act, V.T.C.S. art. 6252-13a).

Moreover, the penalty provision in the Open Records Act does not apply to the release of information pursuant to a subpoena duces tecum issued under chapter 24 of the Code of Criminal Procedure. Because the statutes are about different subjects, have different purposes, and are intended to cover different situations, they are not intended to be construed together.

The Open Records Act is about public access to information about the affairs of government and the official acts of public officials and employees. *See* Gov't Code § 552.001. Chapter 24 of the Code of Criminal Procedure treats matters concerning subpoena and attachment in criminal court proceedings. Each statute contains its own procedures for obtaining information. *See* Gov't Code subch. E; Code Crim. Proc. arts. 24.03 - .04. Each statute contains distinct procedural requirements for resolving the question of whether information must be released. *See* Gov't Code subch. G; Code Crim. Proc. arts. 24.08 - .09. Each statute contains a penalty provision. *See* Gov't Code § 552.353; Code Crim. Proc. art. 24.05; *see also id.* art. 24.07 (making fine against witness conditional). Statutes with different subjects and different purposes and that cover different situations should be construed separately and in accordance with the plain meaning of the particular statute. *See Taylor v. State*, 805 S.W.2d 609 (Tex. App.--Texarkana 1991, no writ); *Ex parte Wilkinson*, 641 S.W.2d 927 (Tex. Crim. App. 1982).

Therefore, the Open Records Act and chapter 24 of the Code of Criminal Procedure are not intended to be considered together. A penalty provision in one statute is not applicable to a transgression under the other. *Cf. Ex parte Wilkinson*, 641 S.W. 2d at 928 (court authorized to compel witness's testimony pursuant to Code Crim. Proc. art. 20.15 may not apply penalty provision of V.T.C.S. art. 1911a, since two provisions are not *in pari materia*); Attorney General Opinion JM-292 (1984) at 4 (provisions of Open Records Act and Administrative Procedure Act, Gov't Code ch. 2001, are distinct, and provisions of one statute cannot be grafted onto other).

Furthermore, section 552.352(a) of the Government Code provides that "[a] person commits an offense if the person distributes information considered confidential under the terms of this chapter."² (Emphasis added.) We think it is clear that

²Subsections (b) and (c) state that:

the legislature did not intend to enlarge the application of the penalty provision in the Open Records Act to affect the release of information pursuant to a grand jury's subpoena duces tecum. Thus, though the subpoenaed information is excepted from required public disclosure under section 552.101 of the Government Code in the context of an open records request, the Open Records Act's penalty provision does not apply to the production of information in response to a subpoena duces tecum issued pursuant to chapter 24 of the Code of Criminal Procedure.

S U M M A R Y

The Open Records Act, including its exceptions and its penalty provision, is not applicable to the production of information pursuant to a subpoena duces tecum issued under chapter 24 of the Code of Criminal Procedure.

Yours very truly,



Kay H. Guajardo
Assistant Attorney General
Opinion Committee

(footnote continued)

- (b) An offense under this section is a misdemeanor punishable by:
 - (1) a fine of not more than \$1,000;
 - (2) confinement in the county jail for not more than six months; or
 - (3) both the fine and confinement.
- (c) A violation under this section constitutes official misconduct.

Gov't Code § 552.352.